

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

IN RE: NEW ENGLAND COMPOUNDING
PHARMACY, INC. PRODUCTS LIABILITY
LITIGATION

MDL No. 1:13-md-2419-FDS

This Document Relates to:
All Cases

**RESPONDING ATTORNEYS SUR-REPLY TO PLAINTIFFS' STEERING
COMMITTEE'S RESPONSE TO MOTION FOR ENTRY OF CASE MANAGEMENT
ORDER ESTABLISHING ASSESSMENT PROCEDURES TO FUND COMMON
BENEFIT ACCOUNT AND AMENDED PROPOSED ORDERS**

I. INTRODUCTION

At the most recent MDL status conference on February 6, 2014, Judge Saylor granted leave for the Official Committee of Unsecured Creditors (the “OCC”), the individual lawyers who sit as proxy for OCC committee members and the Chapter 11 Trustee file sur-replies in response to the Plaintiffs’ Steering Committee’s (“PSC”) Reply in Support of Motion for Entry of Common Benefit Order.¹ The undersigned are attorneys who represent certain plaintiffs who have cases filed in this MDL and who also serve, by proxy, as the representatives to members of Official Committee of Unsecured Creditors (the “Official Committee”)² of New England Compounding Pharmacy, Inc. d/b/a New England Compounding Center (“NECC”). Undersigned counsel respectfully submit this memorandum as sur-reply in connection with the *Plaintiffs’*

¹ NECC 13-md-2419 Hearing Transcript (Saylor) 2-6-14 at 33:18 – 34:15

2 The following creditors currently serve as members of the Official Committee: (1) Katrina Eldreth by Andrews & Thornton; (2) Meghan A. Handy by Cohen Placitella & Roth (3) Brenda Bansale by Lipton Law; (4) Robert Cole by Hagens Berman Sobol Shapiro; (5) Victor Davis by Fiefer, Fieger, Kenney & Giroux; (6) Kathleen Distler by Colling Gilbert Wright & Carter; (7) Danny Swartzell by Skikos Crawford Skikos Joseph; (8) Bertram Walker Bryant, Jr. by Galligan & Newman; and (9) NStar Electric Company by Honor Heath. With respect to each of the eight individual members of the Official Committee, all of whom are asserting personal injury or wrongful death claims against NECC, he or she is represented on the Official Committee by his or her attorney, as indicated.

Steering Committee's ("PSC") Motion for Entry of Case Management Order Establishing Assessment Procedures to Fund Common Benefit Account [Dkt. No. 790] (the "CBF Motion") and accompanying memorandum of law [Dkt. No. 791], our filed Response to CBF Motion [Dkt. No. 830] and the PSC Reply to Response to CBF Motion [Dkt. No. 874].

II. FACTUAL BACKGROUND

On April 11, 2013 the Court entered MDL Order No. 3 – entitled “Order Concerning Sharing and Funding of Plaintiff’s Pretrial Expenses and Costs.” On June 5, 2013 the PSC and OCC subsequently entered into a letter agreement and proposed CMO collectively delineating the relationship between the committees with respect to coordination and communication between the PSC and the OCC. Discussion between the PSC and OCC continued regarding the resulting CMO was entered by Judge Saylor on June 28, 2013 as MDL ORDER No. 6 – Case Management Order [Dkt. No. 209]. On January 17, 2014 the PSC filed the CBF Motion and Memorandum in Support [Dkt. No. 790, 791]. The undersigned plaintiffs, by their attorneys, consolidated only for purposes of responding to the CBF motion, responded to the CBF Motion on January 31, 2014 [Dkt. No. 830] and the PSC replies on February 6, 2014 [Dkt. No. 874]. At the Case Management Conference on February 6, 2014, Judge Saylor granted leave for sur-reply [Transcript 2014-02-06 33:18 – 34:15] and declined to rule on the underlying motion and response deferring that analysis and determination to Judge Zobel, his anticipated successor jurist in this litigation. [Transcript 2014-02-06 35: 2-13].

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III. The PSC Reply misrepresents that the individual attorneys representing OCC committee members by proxy contend that they are “entitled to common benefit fees in the MDL for work done in their role as members of the OCC”

Undersigned counsel for the responding OCC member plaintiffs acknowledge that their legal work and contributions as representatives of the plaintiff victim members of the OCC in connection with specific statutory committee work of the OCC members in dealing with, *inter alia*, the appointed Chapter 11 Trustee (including substantive projects relating to and assisting the Trustee’s efforts in settlement discussions with the Affiliated Defendants) are not expressly addressed under the Bankruptcy Code. However, payment of reasonable fees and expenses (including attorneys’ fees) of Creditors Committee Members through a bankruptcy plan of reorganization, or common benefit under an MDL, is not precluded by statute. For example, the *Lehman Brothers Holdings, Inc. Chapter 11 Reorganization Plan*³ provides for the payment of “reasonable fees and expenses (including attorneys’ fees) of ...(b) the individual members of the Creditors’ Committee, ... incurred in their capacities as ... members of the Creditors’ Committee, [as allowed] Administrative Expense Claims and paid by the Debtors in accordance with the Debtor Allocation Agreement upon application to and subject to approval of the Bankruptcy Court...” . In a subsequently issued written opinion upholding that plan provision, the Bankruptcy Court (Peck, J.) expressly rejected the very same argument raised by the PSC – that the exclusion of individual committee members from the list of entities whose attorneys’ fees may be paid as an administrative expense claim under Section 503(b)(4) means that the committee members’ attorneys’ fees cannot be paid pursuant to a Chapter 11 plan. See *In re Lehman Brothers Holdings, Inc.*, 487 B.R. 181 (Bankr. S.D.N.Y. 2013). As Judge Peck stated:

³ Modified Third Amended Joint Chapter 11 Plan of Lehman Brothers Holdings, Inc. and its Affiliated Debtors (USBC, Southern District of New York 08-1355 (JMP) December 5, 2011) at Section 6.7 (page 85)

“- [The objection] is based on the proposition that Section 503(b) standards for allowing administrative expenses necessarily must govern the right of individual members of an official committee to receive reimbursements for their professional expenses. That mixes up the test for being able to assert an administrative expense claim with the right to receive a payment that the Debtors voluntarily have proposed to make under the Plan and that may be authorized in accordance with Section 1129(a)(4).” Id. At 193. *Accord In re Adelphia Commc’ns Corp.*, 441 B.R. 6, 19 (Bankr. S.D.N.Y. 2010) (“to the extent that the requested fees are reasonable, and the requirements of section 1129(a)(4) likewise are complied with, [the plan provision providing for reimbursement for certain creditors’ professional fees] is permissible, and the [Bankruptcy] Code permits the [applicants’] reasonable fees to be recovered under that provision without showing compliance with sections 503(b)(3) or (4).”)

Significantly and similarly, there is absolutely no bar to application by the individual attorneys, who also happen to serve by proxy as OCC members, for potential reimbursement for their MDL common benefit efforts expended as contemplated by the MDL Court, such as those mentioned in MDL Order No. 6 for the common benefit of the Plaintiffs in this MDL.⁴

IV. MDL Order No. 6 – Case Management orders specific authority and actions by the OCC members separate and apart from the statutory duties of the OCC in participating in settlement discussions with unaffiliated defendants and non-parties to MDL. The OCC’s actions are co-equal with those assigned to the PSC within the same order.

The provisions of MDL Order No. 6, entered June 28, 2013, at Section I – Settlement

⁴ Manual for Complex Litigation, Fourth §22.62 pg. 407; “The cost of legal services may be apportioned among all parties who benefit from the services... (i)n general, those attorneys who provide a common benefit to a group of litigants may also receive compensation from a common fund – even if the attorneys who provide the benefit are not part of an official committee.”

Discussions with Unaffiliated (page 9) provides in part that “Plaintiffs’ lead counsel and the Creditors’ Committee may each designate one or more members or member representatives to participate in settlement discussions with unaffiliated defendants and non-parties.” “The Plaintiffs’ Steering Committee’s designee(s) and the Creditors’ Committee designee(s) should communicate and cooperate with respect to settlement discussions.” Further, at Section J – Mediation with Unaffiliated Defendants and Non-Parties (page 10) the Creditors’ Committee is instructed to confer and submit along with the PSC a proposed mediation plan. The Court clearly recognized the equal dignity of the two committees and instructs each to assign work specifically designated to be for the common benefit of all Plaintiffs in this MDL.

V. MDL Order No. 6 – Case Management Order - Section G – Reservation of Rights anticipates that the provisions of Order No. 6 are separate and apart from and not intended to “limit, restrict or otherwise affect the authority and duties of the Creditors’ Committee” under the Bankruptcy Code.

Specific provisions of MDL Order No. 6 directs appointment of attorneys serving on or at the pleasure of the PSC and the OCC respectively to settlement and mediation groups and requires coordination and reports by those members to this Court. The plain language of Order No. 6 clearly indicates that the appointed representatives from the PSC and the OCC are of equal dignity and ordered to engage in co-equal actions for the common benefit of all plaintiffs in the MDL.

VI. The provisions of MDL Order No. 3 and MDL Order No. 6 are inconsistent with respect to source of assignments of individuals and actions for the

common benefit of the Plaintiffs.

MDL Order No. 3, in April 2013, provides in part at 2.A.2 that “all claims for time and expenses submitted must be incurred only for work authorized in advance by the Lead Counsel.” Several months later in June 2013, MDL Order No. 6 (Sections I and J) instructs the PSC and OCC committees to make independent assignments to non-affiliated defendant and non-party mediation and settlement teams working under the auspices of the MDL. The ensuing work of mediation and settlement are by their very nature the essence of common benefit to all plaintiffs. Since the mediation and settlement work of many attorneys, as assigned by both Committees, is currently underway and the Common Benefit Assessment motion is requesting impounding a significant percentage of funds potentially generated by those mediation and settlement discussion, it seems an appropriate time to address the reconciliation of the two orders. As such, the undersigned member’s representatives respectfully request that previously proposed MDL Order No. 3 (Reply – Exhibit C Dkt. No. 830) be adopted.

Dated: February 13, 2014
Irvine, CA

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that on this 13th day of February 2014, I served a true and accurate copy of the following: **RESPONDING ATTORNEYS SUR-REPLY TO PLAINTIFFS' STEERING COMMITTEE'S RESPONSE TO MOTION FOR ENTRY OF CASE MANAGEMENT ORDER ESTABLISHING ASSESSMENT PROCEDURES TO FUND COMMON BENEFIT ACCOUNT AND AMENDED PROPOSED ORDERS;** electronically with the Clerk of Court via the CM/ECF system which sent electronic notification of this filing to all registered counsel of record via email.

s/ Anne Andrews

Anne Andrews